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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

THOMAS A. MOSELEY and ELAINE F. MOSELEY,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Georgia Compulsory Apportionment law, O.C.G.A. § 51-12 5.1(e)(2), violates the Takings Clause of the Fifth Amendment to the United States Constitution because, upon the entry of a judgment awarding punitive damages in product liability actions, the statute transfers a 75% interest in the punitive damages portion of that judgment to the State of Georgia?[1]

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[1] General Motors Corporation was a defendant in the underlying product liability litigation below. In the State Court of Fulton County, Georgia, where this case was tried, it was styled as *Thomas A. Moseley, et al. v. General Motors Corporation and David G. Ruprecht*, Civil Action No. 90V6276. The product liability component of the action was against General Motors; David Ruprecht was sued individually for negligence in the operation of a vehicle.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App., *infra,* A2) is reported at 263 Ga. 679, 436 S.E.2d 632. The February 26, 1993 Order of the State Court of Fulton County (App., *infra,* A26) is unreported.

JURISDICTION

The Supreme Court of Georgia announced its opinion below (App., *infra,* A2) on November 22, 1993. The Court denied the petitioners' motion for reconsideration on

December 17, 1993. (App., *infra*, A1). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISION INVOLVED

Section 51-12-5.1(e) of the Official Code of Georgia Annotated provides as follows:

> (e)(1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.
>
> (2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Fiscal Division of the Department of Administrative Services. Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A judgment debtor may remit the state's proportional share of punitive damages to the clerk of the court in which the judgment was rendered.

> It shall be the duty of the clerk to pay over such amounts to the Fiscal Division of the Department of Administrative Services within 60 days of receipt from the judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

STATEMENT OF CASE

This case arose from petitioners' personal injury and product liability claims against General Motors Corporation ("GM") and David G. Ruprecht in the State Court of Fulton County, Georgia.[2] On February 4, 1993, a jury returned a verdict in favor of the petitioners. The verdict included an award of $101,000,000 in punitive damages against GM. (App., *infra*, A23-A25)

On February 23, 1993, pursuant to what is known as the compulsory apportionment law, O.C.G.A. § 51-12-5.1(e)(2), the State of Georgia asserted title to 75% of the petitioners' punitive damages award.[3] That law

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[2] The petitioners brought wrongful death and estate claims. The theories of recovery against GM – strict liability, failure to warn, and negligent design – are recognized as product liability theories under Georgia law. *See* § O.C.G.A. 51-1-11(c); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993).

[3] The state submitted a Brief in Opposition to the Plaintiffs' Motion to Declare O.C.G.A. § 51-12-5.1(e)(2) Unconstitutional. The state's brief was in response to a pretrial motion filed by the petitioners on December 31, 1992. On February 24, 1993, the State filed two additional motions: (a) a Motion to Intervene; and (b) a Petition to Apportion Punitive Damages within Judgment.

establishes the following mechanism for the recognition and enforcement of the state's rights:

1. It declares the state's right to 75% of any punitive damage award in certain product liability actions[4] and directs that any money collected be paid into the state treasury;

2. It declares that the state's apportionment right comes into being upon the entry of judgment;

3. To enforce the state's interest, it declares that the state possesses the "rights *due* a judgment creditor" and further declares that the state stands "on equal footing with the plaintiff of the original case in securing a recovery . . . "

4. Finally it declares that the state's right to collect its share of the punitive damages award is held in abeyance until after "payment to the plaintiff of damages awarded other than as punitive damages."

For present purposes, however, the last sentence of O.C.G.A. § 51-12-5.1(e)(2) is the key provision. It makes clear that the state has no rights directly against the product liability defendant: "This paragraph shall *not* be construed as making the state a party at interest . . . " It continues: "[T]he *sole* right of the state is to the *proceeds*

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[4] Under the Georgia one verdict rule, there can only be a single punitive damages award for any given product defect. After such an award, the defendant is not liable for punitive damages in any future case where liability is based on the same defect. O.C.G.A. § 51-12-5.1(e)(1).

as provided in this paragraph." In short, under the compulsory apportionment law, the state's rights are *derivative*. The state steps into the shoes of the plaintiff to the extent that the plaintiff successfully asserts, reduces to final judgment, and ultimately collects a punitive damages award in a product liability case.

On February 26, 1993, the trial court entered judgment in accordance with the jury verdict. (App., *infra*, A20-A22).[5] It also entered an order, (App., *infra*, A26-A31), declaring the compulsory apportionment law unconstitutional on various grounds including the Takings Clause of the Fifth Amendment to the United States Constitution.[6] On March 8, 1993, the trial court denied the state's motion to intervene. The state appealed to the Supreme Court of Georgia.

The Supreme Court of Georgia reversed the trial court's holding that the compulsory apportionment law violated the Takings Clause of the Fifth Amendment to the United States constitution.[7] (App., *infra*, A2-A4). In so doing, the Court simply adopted the reasoning of a companion case decided on the same day, *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993). (App., *infra*,

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[5] This judgment was modified *nunc pro tunc* on April 15, 1993. The modification has no bearing on the consideration of this petition. (App., *infra*, A32-A33).

[6] The Fifth Amendment is made applicable to the State through the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & O. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[7] The Supreme Court of Georgia reversed the trial court order of February 26, 1993 in all respects. But the only ground relevant to the present petition is the rejection of the Takings Clause argument.

A5-A19). The full extent of the Court's reasoning in *Conkle* was the following:

> [T]he trial court erred in holding that subsection (e)(2), which requires that seventy-five percent of the punitive damages awarded in a product liability case be paid to the state, constitutes a taking under the Fifth and Fourteenth Amendments to the United States Constitution. A plaintiff has no vested property right in the amount of punitive damages which can be awarded in any case, and the legislature may lawfully regulate the amount of damages which can be awarded.

436 S.E.2d at 639. (App. *infra*, A13). The Court did not cite or discuss any of this Court's most pertinent takings decisions such as *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), and *United States v. Sperry Corp.*, 493 U.S. 52 (1989). Nor did it discuss or acknowledge the fact that the state, as an outsider to product liability litigation, literally succeeds to or confiscates the property rights of the prevailing plaintiff. Instead, it cited three Georgia decisions applying the "vested right" doctrine. *Bagley v. Shortt*, 261 Ga. 762, 410 S.E.2d 738 (1991); *Teasley v. Mathis*, 243 Ga. 561, 255 S.E.2d 57 (1979); *Kelly v. Hall*, 191 Ga. 470, 12 S.E.2d 881 (1941). These decisions generally uphold the right of the legislature to modify or abrogate common law rights and to apply the new rule to cases pending at the time of the legislative enactment. *See, e.g., Spengler v. Employers & Ins. Co.*, 206 S.E.2d 693, 131 Ga. App. 443 (1974).

REASONS FOR GRANTING PETITION

I. Introduction

Besides Georgia, nine states have comparative apportionment laws.[8] (App., *infra*, A34-42). These laws came into being as a part of a tort reform movement in the late 1980s. They apply only to cases involving the award of punitive damages. Although varying as to particulars, each law by fiat gives the state a share of at least some punitive damage awards based entirely on the result achieved by a plaintiff in litigation against another private party. None of the existing laws requires the state to appear as a party to the litigation or otherwise to directly assert its punishment or deterrence interests against a defendant. In each instance, the state's right or title to the proceeds of a punitive damages award arises after the fact of judgment and is wholly dependent upon the substantive claims asserted by the plaintiff. In the absence of litigation creating a property right in the plaintiff, the state would have no property to commandeer.

The present case involves a question of substantial public importance for three reasons. First, to the extent that compulsory apportionment laws are a significant, though still small, component of tort reform legislation, a clear resolution of their constitutional status is desirable. Other states may wish to consider similar legislation but hesitate due to constitutional concerns. Second, given the degree to which the operational mechanism of these laws

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[8] *See* Col. Rev. Stat. § 13-21-102; Fla. Stat. Ann. § 768-73; Ill. Rev. Stat. Ch. 110 ¶ 2-1207; Iowa Code Ann. § 668A.1; Kan. Stat. Ann. § 60-3402; Mo. Ann. Stat. § 537.675; N.Y. C.P.L.R. 8701; Or. Rev. Stat. § 18.540; Utah Code Ann. § 78-18-1.

involves the apparent conscription of private property, this Court should address the takings question. In particular, why is it *permissible* for the State of Georgia to assert title to part of a punitive damages award in product liability actions and yet *impermissible* to do so in connection with other monetary recoveries? Third, a decision on the merits in this case would answer a related yet important question whether the state in a civil proceeding can impose a financial penalty against a private defendant without also being a party (or intervenor) to the case and asserting those interests directly. In their present form, comparative apportionment laws permit the states to sanction *in absentia*.

II. The Lower Courts Are In Conflict on the Taking Question

Prior to the decision below, three state courts and one federal district court had addressed the constitutionality of compulsory apportionment laws. Thus far, two courts have found these laws unconstitutional. *McBride v. General Motors Corp.*, 737 F.Supp. 1563 (M.D. Ga. 1990); *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991). Two courts have upheld them, *Gordon v. State*, 608 So.2d 800 (Fla. 1992); *Shepherd Components Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612 (Iowa 1991). The decision of the Georgia Supreme Court below represents the third case adopting the view that compulsory apportionment laws are constitutionally valid. It is significant, however, that all of these courts considered the property interest issue highly significant if not dispositive of the constitutional question presented. In short, as petitioner

understands these cases, if a property interest had been found to exist, all of these courts would have found a constitutional violation even though the regulatory objective behind compulsory apportionment laws is not itself impermissible.

Of the two cases invalidating compulsory apportionment laws, the analysis in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), is most illustrative. There the Colorado Supreme Court considered a compulsory apportionment law identical in all material respects to Georgia's. On the property interest question, it recognized that property, as defined in *Black's Law Dictionary*, "denotes everything that is the subject of ownership, whether tangible or intangible, as well as those rights and interests which have value to the owner." *Id.* at 266. Included within that broad definition of property was the legal right to claim damage for an injury and necessarily any judgment obtained as a result of the successful prosecution of such a claim. *Id.* It was immaterial that the plaintiff's property interest happened to be a right incident to a judgment awarding punitive damages, as opposed to some other form of damages. That distinction, in the court's view, went to the form of the property interest, not to its substance.

The property interest analysis in *Kirk* lead to the conclusion that plaintiff's right to the punitive damage award *preceded* the emergence and attachment of the state's right to a forced share. As the court noted about Colorado law, it "contemplates the entry, and actual collection, of a final judgment on behalf of the injured party, for it is *only after* the injured party has invested the time,

effort, and expense of obtaining and actually collecting the judgment that the statutory grant of one-third interest to the state comes into play." *Id.* In other words, under the *Kirk* rationale, the legislatively mandated attachment of the state's interest in the punitive damages award *subsequent* in time to the plaintiff's enforcement of his property right is what made the state's encroachment a taking.[9]

It is important to recognize what the *Kirk* reasoning does not preclude. There is nothing in the *Kirk* court's reasoning that would foreclose state regulation of punitive damages by other means such as a damages cap or by a procedure that would permit the state to intervene on behalf of the public to request punitive damages. Either approach would have regulatory benefits similar to those underlying compulsory apportionment laws. The latter approach, however, would allow the state, as a party to litigation, to share in the award of punitive damages without eroding the fundamental distinction between takings and regulation.

The analysis in both *Gordon v. State*, 608 So.2d 800 (Fla. 1992), and *Shepherd Components Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612 (Iowa 1991) is quite different from *Kirk*. It turns on an application of

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[9] The Colorado Supreme Court in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991) cited and briefly discussed *McBride v. General Motors Corp.*, 737 F.Supp. 1563 (M.D. Ga. 1990). *McBride* held the Georgia compulsory apportionment law, O.C.G.A. § 51-12-5.1(e)(2), invalid on both state and federal constitutional grounds. Although *McBride* discussed the property interest issue in reaching its conclusions, it was not asked to rule on the takings ground.

what is known as the "vested rights" doctrine. Under that doctrine as applied in both cases, because there is no indefeasible legal or constitutional right to recover punitive damages under state law, the state is free to regulate, abridge or even eliminate the right to recover punitive damages altogether. Any legal mechanism restricting punitive damages is almost automatically constitutional.[10] This analysis overlooks two central points.

First, the vested rights doctrine applies when *legislation* is passed modifying or eliminating pre-existing statutory or common law rights. The key is that the former right no longer exists in favor of anyone. The doctrine promotes uniformity in the application of legal rules. Because the former right has become a nullity, it cannot be illegal or unconstitutional to apply the new legislative rule to any case prior to final judgment. To hold otherwise would mean that similarly situated litigants would be subject to different legal norms based upon the timing

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[10] Until the decision of the Georgia Supreme Court below, Georgia's version of the vested right doctrine had never been carried this far. *See, e.g., Terry v. State Farm Mut. Auto. Insur. Co.*, 422 S.E.2d 212, 205 Ga. App. 224 (1992); *Bagley v. Shortt*, 410 S.E.2d 738, 261 Ga. 762 (1991); *Teasley v. Mathis*, 255 S.E.2d 57, 243 Ga. 561 (1979); *Kelly v. Hall*, 12 S.E.2d 881, 191 Ga. 470 (1941). The doctrine addressed only the retroactive application of *legislation* (as opposed to judicial action) modifying or extinguishing rights. As early as *Kelly v. Hall, supra*, in 1939, the Supreme Court of Georgia concluded that the General Assembly can enact a law eliminating the right to recover a penalty and can apply the new legislative rule to pending cases that have not yet reached the stage of a final, non-appealable judgment. *See also, Spengler v. Employers & Ins. Co.*, 206 S.E.2d 693, 131 Ga. App. 443 (1974).

of the lawsuit – whether it was filed before rather than after the enactment of the amendatory legislation.

Second, compulsory apportionment laws, including Georgia's, do not modify or eliminate the state created right to recover punitive damages. On the contrary, they *presuppose* that the right to recover punitive damages will be enforced to the full extent of the law and then, after that right has been reduced to judgment and becomes collectible, the state steps in and asserts an interest in the property right which the plaintiff has brought into being. Application of the vested right doctrine masks the taking issue. Under that doctrine, both Florida and Iowa assert that *because* they *could* eliminate or modify the common law right to punitive damages *legislatively*, it is permissible for the state to share in the proceeds of any punitive damages recovery that a plaintiff might obtain in private litigation. This approach does not involve a change in the *substance* of the right that the plaintiff asserts; it involves a change in the *ownership* of the substantive right upon its *successful* exercise. This is a taking of property by legislative fiat and the vested right doctrine does not alter that basic fact.

The intervention of this Court is necessary to clarify these issues. If not undertaken, states under the guise of the vested right doctrine can claim a share in the proceeds of virtually any state created right subject to the litigation process. There is nothing inherent in the vested right doctrine as articulated in *Gordon* or *Shepherd Components* that would limit its application to cases involving the recovery of punitive damages.

III. The Decision Below Conflicts With Precedent of this Court

Under established constitutional principles, a taking occurs only if the state acquires title to property or so oppressively regulates property that it has no residual use or economic value, *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2892-95 (1992). The existence of a property interest is determined solely by reference to state law.[11] For present purposes, therefore, the question is whether the petitioners possessed a property interest in the punitive damages award to which the State of Georgia's claim has attached. If so, the state acquired title to a portion of that award under the compulsory apportionment law and the obligation to pay just compensation arises.

A. Property Interest Decisions

The petitioners' right to recover punitive damages against GM constitutes property under the decisions of this Court and by any other pertinent legal measure. Under the Georgia compulsory apportionment law, a product liability plaintiff's judgment awarding punitive damages is the *res* to which the state's apportionment

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[11] *Board of Regents v. Roth*, 408 U.S. 564 (1972) is controlling in this regard. Although *Roth* is a procedural due process case, its discussion of the source of property rights applies equally to takings cases. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980) (applies *Roth* property rights analysis in taking case).

right attaches. Unless a product liability plaintiff successfully reduces his right to judgment, the state has nothing. The state can claim only through the plaintiff and can collect only to the degree that the plaintiff is successful in a product liability claim. In this respect, the state's rights are totally derivative. Title to the monetary "proceeds" of a punitive damages award runs from GM to the petitioners and then to the State of Georgia.[12]

Under the decisions of this Court, a mere right of action – much less a judgment – is property in the constitutional sense. For example, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court discussed whether trade secrets – an intangible interest – could be considered property under the Takings Clause of the Fifth Amendment. The Court was unanimous in holding that it could be and noted that the proposition had "long been implicit" in the Court's thinking. *Id.* at 1003. In a similar vein, the Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) held that the right to a fair employment adjudicative proceeding was a form of property protected by the Due Process Clause. Citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the *Logan* Court held that "a cause of action is a *species of property* protected by the . . . Due Process Clause." 455 U.S. at 428. The Court's view that a cause of action is property is reflected in many

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[12] Until the petitioners had a judgment designating what they could recover, there could be no transfer of any rights to the state in the first place. The fact that, after the entry of judgment below, a further transfer of property rights occurred in favor of the state does not diminish the legal significance of the intermediate step – the transfer of a property right from GM to petitioners.

other legal contexts as well.[13] The Georgia Supreme Court's view of property as reflected in its application of the vested right doctrine conflicts with these decisions.

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[13] Georgia case law has not developed this line of reasoning as fully as the United States Supreme Court but the Supreme Court of Georgia has held that a compensable property interest encompasses more than a direct physical invasion of real or personal property. For example, in *Bowers v. Fulton County*, 146 S.E.2d 884, 889, 221 Ga. 731 (1966), it observed in a condemnation case that the taking or damaging with which Article I, § 3, ¶ 1 is concerned "may be of any species of property." 146 S.E.2d at 890. A few sentences later this Court stated that "a condemnee is under [this] constitutional provision entitled to just compensation for every species of property taken or damaged, real or personal, corporeal or incorporeal." 146 S.E.2d at 890.

Upon death, title to all personal property vests in the administrator of a decedent's estate. O.C.G.A. § 53-4-8. This includes choses-in-action, *Life & Casualty Ins. Co. v. Marks*, 72 Ga. App. 640, 34 S.E.2d 633 (1945) and those tort actions that survive under O.C.G.A. § 9-2-41 which would include the petitioners' pain and suffering claim against GM on behalf of their son. Upon appointment of an administrator in intestacy cases, the administrator has the right to possession of the whole estate. The administrator has the "sole" right to "recover possession of the estate from third persons." O.C.G.A. § 53-4-9. This likewise would include tort actions surviving under O.C.G.A. § 9-2-41.

Similarly, a cause of action for pain and suffering during the life of the decedent is considered a part of the gross estate for federal estate tax purposes. The pertinent provision states: "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death." 26 U.S.C. § 2033. Recently, the United States Tax Court held that a "churning" cause of action against Merrill Lynch, which included a substantial punitive damages claim, was includible in the decedent's gross estate based on the value of the cause of action on the date of death. *Estate of Ethlyn Davis v. Commissioner*, 65 T.C.M. (CCH) 2365 (April 8, 1993). *See*

B. Taking Decisions

The closest Supreme Court decision on point is *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In *Webb's*, the corporate purchaser of Webb's Fabulous Pharmacies, Inc. deposited the purchase price into the registry of the clerk of court. The deposit was for the benefit of Webb's many creditors, all of whom were interpleaded. The taking question arose because a Florida statute authorized the clerk to retain the interest earned on the deposit. This was in addition to a statutory fee imposed as a charge for the clerk's services. The Supreme Court held that the interest retention pursuant to the Florida statute was an unconstitutional taking.

In coming to this conclusion, the Court had to address the threshold question of property interest. It found that the *creditors* asserting claims against the interpleader fund had constitutionally protected property rights. The Court observed:

> It is true, of course, that none of the creditor claimants had any right to the deposited fund

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also Rev. Rul. 75-127. In this vein, the Georgia Estate Tax rules track the federal. *See* O.C.G.A. §§ 48-12-1 through -6.

Finally, under 11 U.S.C. § 541, any cause of action possessed by a debtor when bankruptcy proceedings are commenced becomes a part of the estate. This would include a claim for punitive damages. The trustee can therefore stand in the shoes of the debtor to maintain such an action and the proceeds collected from that litigation would be available to pay the bankrupt's debts. *In re M & L Business Mach. Co. Bankruptcy*, 136 B.R. 271 (1992); *In re Bell & Beckwith Bankruptcy*, 50 B.R. 422 (1985); *Collins v. Federal Land Bank of Omaha, Iowa*, 421 N.W.2d 136 (1988).

> until their claims were recognized and distribution was ordered. . . . That *lack of immediate right*, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use that is realized in the interim.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161-62 (1980) (citations omitted; emphasis added). The parallel to the petitioner's property interest in the present case is striking. *Webb's Fabulous Pharmacies* teaches that, under federal takings analysis, a protectable (and therefore compensable) property interest can arise *before* the entry of judgment.[14]

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[14] A recent decision of the D.C. Circuit illustrates how broad the concept of property can be for the purposes of taking analysis. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the D.C. Circuit held that the Presidential Records and Materials Preservation Act of 1974 constituted a taking of President Nixon's presidential papers and thus required just compensation. It is noteworthy that the court did not limit itself to statutes and the common law to determine whether President Nixon had a property interest. It concluded:

> History, custom, and usage – relating to former Presidents and to those dealing with former Presidents – indicate unequivocally that presidential papers have been treated as the President's private property. This custom and usage evidence the kind of mutually explicit understandings that are encompassed with the constitutional notion of "property" protected by the Fifth Amendment.

If this was enough in *Nixon* to be "property" in the Fifth Amendment sense (indeed, a *per se* taking in the view of the D.C. Circuit), the petitioner's argument for recognition of a property interest below by comparison is compelling.

The Supreme Court's taking analysis in *United States v. Sperry Corp.*, 493 U.S. 52 (1989) strongly corroborates the petitioners' interpretation of *Webb's Fabulous Pharmacies*. In the aftermath of the Iranian Hostage crisis, Sperry Corporation filed a claim against the Iranian government resulting in the attachment of Iranian assets. Sperry ultimately reached a settlement in the amount of $2.8 million. By that time the Iran-United States Claims Tribunal had been established at the Hague. This settlement was filed with the Tribunal; it gave Sperry the significant benefit of being able to enforce the settlement in any nation in the world. 493 U.S. at 57-58. As an additional benefit, Sperry was able to secure payment of its claim through a funds transfer mechanism routed through the Federal Reserve Bank of New York. *Id.* Sperry objected to the requirement that it pay a percentage of its award to reimburse to the United States for costs incurred.[15]

The Supreme Court rejected Sperry's taking claim without seriously questioning whether the filing of the settlement agreement created a property interest in Sperry's favor. The Court found no evidence in the record to suggest that the deduction was akin to a "situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee." 492 U.S. at 62. In this vein, the Court distinguished *Webb's*

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[15] The basis for this assessment was a provision in the Accord establishing the Tribunal declaring that "[t]he expenses of the Tribunal shall be borne equally by the two governments." There was no dispute in *Sperry* that the United States did in fact incur significant costs in negotiating the Accord and supporting the Tribunal.

Fabulous Pharmacies as an uncompensated taking case because there was no "justification for the deduction of the interest other than the bare transfer of private property" to government. 492 U.S. at 62 n. 8.

Compulsory apportionment laws, such as Georgia's fall on the *Webb's Fabulous Pharmacies* side of the line for purposes of taking analysis. The State of Georgia wants 75% of punitive damages awarded in product liability cases because it believes the plaintiff is less deserving of the money than the state which presumably acts in the public interest. The fact that the state believes that it has a good reason for the 75% apportionment rule does not make O.C.G.A. § 51-12-5.1(e)(2) any less of a taking. The distinction between unlawful takings and permissible regulations of private property is a fundamental one in our jurisprudence. This case is an occasion for reasserting that distinction so that government will carefully choose the mechanisms it uses to promote public policies that may be sound. The validity of the regulatory goal, however, does not assure the constitutionality of the legislative vehicle.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted and the judgment of the Supreme Court of Georgia reversed.

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SUPREME COURT OF GEORGIA

ATLANTA DECEMBER 17, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93A1129

STATE OF GEORGIA V. THOMAS A. MOSELEY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

STATE of Georgia

v.

Thomas A. MOSELEY et al.

No. S93A1129

Supreme Court of Georgia.

Nov. 22, 1993.

Reconsideration Denied Dec. 17, 1993.

SEARS-COLLINS, Justice.

This appeal stems from a products liability action brought against the General Motors Corporation by the appellees, Thomas and Elaine Moseley. Following a jury verdict awarding, in relevant part, $101,000,000 in punitive damages against General Motors, the State of Georgia sought to have the trial court apportion 75% of the punitive damages award to the State under OCGA § 51-12-5.1(e)(2). That statute apportions 75% of an award of punitive damages in a products liability action to the State of Georgia and 25% to the plaintiff. The trial court, based upon a motion filed by the Moseleys, held § 51-12-5.1(e)(2) unconstitutional. The State has appealed, contending that the trial court erred in holding the statute unconstitutional. We agree and reverse.

1. At the outset, we note that this Court has held that § 51-12-5.1(e)(2) does not violate equal protection, does not violate the "Takings" clauses of the United States and Georgia Constitutions, and is not a revenue raising measure and thus does not violate Art. 3, Sec. 5, Par. 3 of the Georgia Constitution. *Mack Trucks, Inc., v.*

Conkle, ___ Ga. ___, ___-___, 436 S.E.2d 635 (1993). Accordingly, the trial court's holdings to the contrary in this case are error and must be reversed.

2. The State also contends that the trial court erred by holding that § 51-12-5.1(e)(2) violates the right to a jury trial as guaranteed by Art. 1, Sec. 1, Par. 11 of the Georgia Constitution. We agree.

Art. 1, Sec. 1, Par. 11 provides, in relevant part, that "[t]he right to trial by jury shall remain inviolate." We have construed this provision as guaranteeing the right to a jury trial in those cases in which such a right existed at common law or by statute at the time of the adoption of the Georgia Constitution of 1978. *Benton v. Georgia Marble Co.*, 258 Ga. 58, 66, 365 S.E.2d 413 (1988). The Moseleys, however, contend that under the common law it was the function of the jury to determine what amount of punitive damages must be awarded to a plaintiff to punish or deter a defendant and that the legislature improperly interferes with that award, and thus violates Art. 1, Sec. 1, Par. 11, by apportioning 75% of the award to the State. The Moseleys, in essence, are asking this Court to rule that Art. 1, Sec. 1, Par. 11 prohibits the General Assembly from abrogating or circumscribing common law or statutory rights of action. We have held, however, that that provision of the constitution has no such effect, *Teasley v. Mathis*, 243 Ga. 561, 564, 255 S.E.2d 57 (1979); see also *Georgia Lions Eye Bank, Inc. v Lavant*, 255 Ga. 60, 61-62, 335 S.E.2d 127 (1985), and we decline to part from that rule in this case.

Moreover, we find no violation of the rule of *Benton v. Georgia Marble*, 258 Ga. at 66, 365 S.E.2d 413. A jury

determined the amount of damages that the jury believed would serve to punish General Motors and to deter its future conduct. The appellees were entitled to 25% of that amount. The appellees thus received a jury trial on the amount of punitive damages to which they were entitled. Under these circumstances, we hold there is no violation of Art. 1, Sec. 1, Par. 11.

3. The State next contends that the trial court erred by holding that § 51-12-5.1(e)(2) violates Art. 1, Sec. 1, Par. 12, of the Georgia Constitution. We agree. Art. 1, Sec. 1, Par. 12 provides that "[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." Relying on cases from Florida and Texas, the Moseleys contend that this constitutional provision precludes any legislative interference with the amount of punitive damages a plaintiff may recover. However, this Court has concluded that Art. 1, Sec. 1, Par. 12 was never intended to provide an expansive right of " 'access to the courts' " but was only intended to provide a " 'right of choice' (between self-representation and representation by counsel)." *Nelms v Georgian Manor Condominium Assn.*, 253 Ga. 410, 413, 321 S.E.2d 330 (1984) (parenthetical in original). Accordingly, in this case, the trial court erred by holding that § 51-12-5.1(e)(2) violated Art. 1, Sec. 1, Par. 12.

Judgment reversed.

All the Justices concur, except BENHAM, J., who is disqualified.

MACK TRUCKS, INC.

v.

CONKLE, et al.

STATE Of Georgia

v.

CONKLE, et al.

Nos. S93A0725, S93A0726.

Supreme Court of Georgia.

Nov. 22, 1993.

CLARKE, Chief Justice.

Appellee Daniel Conkle was injured in October, 1988, after the tractor trailer truck he was driving overturned when its right frame rail broke. Conkle and his wife filed suit against appellant Mack Trucks, Inc. (Mack), the manufacturer of the truck, alleging that the frame rail broke as the result of a fatigue crack, and that Mack was liable under product liability theories of strict liability and negligence. Additionally, the appellees sued Interstate Truck Leasing, Inc. (ITL), the repair facility for the truck, for negligently failing to maintain the truck and discover its defects.

The jury returned special verdicts, finding that ITL negligently failed to maintain the truck, and that Mack was liable for "negligent failure to recall or warn." The jury found that Mack was not liable under a theory of "strict products liability." The jury also found that Daniel Conkle was responsible for 15% of his injuries. The jury returned a verdict for compensatory damages in the

amount of $184,082, and an award of punitive damages against Mack in the amount of $2 million.

As part of the judgment in this case, the trial court granted the appellees' motion to declare OCGA § 51-12-5.1(e)(2) unconstitutional. That subsection of the code provides, in part, that seventy-five percent of awards of punitive damages arising out of product liability cases, less costs and reasonable attorney fees, "shall be paid into the treasury of the state."

ITL did not appeal the judgment. In Case No. S93A0725, Mack appeals the award of punitive damages, but does not contest the award of compensatory damages. In Case No. S93A0726, the State of Georgia appeals the trial court's determination that OCGA § 51-12-5.1(e)(2) is unconstitutional. As some of the enumerations of error in each appeal overlap, they will be treated together.

1. Appellant Mack Trucks, Inc. (Mack) initially argues that the award of punitive damages under OCGA § 51-12-5.1(e)(1)[1] cannot be sustained because that subsection relates to actions arising from product liability, and the jury's special verdict concluded that Mack was not liable for "strict products liability." Therefore, Mack argues, the trial court erred in not applying subsection (g)[2] of the statute, with the resulting effect that the award

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[1] Subsection(e)(1) provides, in part, "In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages."

[2] This subsection provides, "[f]or any tort action not provided for by subsection (e) or (f) [relating to awards of punitive

of punitive damages would be capped at $250,000. Mack argues that this court should limit a product liability action to the definition found in OCGA § 51-1-11(b) which provides that a manufacturer of property sold as new property shall be liable in tort to any person who uses, consumes, or is affected by the property, and

> who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

As can be seen, under OCGA § 51-1-11(b), "strict liability is imposed for injuries suffered." *Talley v. City Tank Corp.*, 158 Ga.App. 130, 134, 279 S.E.2d 264 (1981). However, the jury's verdict in this case, that Mack is liable on the basis of its "negligent failure to recall or warn," was based on a negligence theory of product liability which is recognized under OCGA § 51-1-11(c).[3]

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damages for intentional torts] of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00."

[3] This subsection provides that "[t]he limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless or wanton disregard for life

Browning v. Maytag Corporation, 261 Ga. 20, 401 S.E.2d 725 (1991). See also, *Talley*, supra, 158 Ga.App. at 137, 279 S.E.2d 264. As such, the trial court correctly concluded that this was a product liability action sounding in negli gence, and did not err in refusing to apply OCGA § 51-12-5.1(g) to the award of punitive damages.

2. The trial court declared OCGA § 51-12-5.1 unconstitutional in several respects.

(a) The trial court initially held that subsection (e)(2), requiring that seventy-five percent of punitive damages awarded in a product liability action be paid into the state treasury, violates the equal protection clauses of the United States and Georgia Constitutions because it discriminates arbitrarily between product liability plaintiffs and plaintiffs in all other tort cases. In order to withstand an equal protection challenge under the rational basis test, which the parties concede is applicable here, the statutory classification

> must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Allrid v. Emory University*, 249 Ga. 35, 38 (285 S.E.2d 521) (1982).

To address the constitutionality of this subsection, the statute must be analyzed in its entirety. We begin with the premise that there is no constitutional right to an

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or property. *Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from the use of a product once that danger becomes known to the manufacturer.*" (Emphasis supplied.)

award of punitive damages. *Teasley v. Mathis*, 243 Ga. 561, 255 S.E.2d 57 (1979); *Kelly v. Hall*, 191 Ga. 470, 472, 12 S.E.2d 881 (1941).

OCGA § 51-12-5.1 sets forth a comprehensive scheme regulating punitive damages which may be awarded in tort actions. Subsection (a) provides that punitive damages are awarded to "penalize, punish or deter a defendant." Subsection (c) provides that punitive damages "shall not be awarded as compensation to a plaintiff, but solely to punish, penalize, or deter a defendant." The remainder of the statute is three-tiered, addressing awards of punitive damages in product liability cases, (subsection e); in tort cases which do not involve product liability but in which the defendant acted, or failed to act, with the "specific intent to cause harm" (subsection f); and in all other tort actions which subsections (e) and (f) do not address (subsection g).

Subsection (e)(1) provides that, in product liability cases, there is no limitation on the amount which may be awarded as punitive damages. However,

> [o]nly one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.

Subsection (e)(2) provides that seventy-five percent of the punitive damages awarded in a product liability action, less costs of litigation and attorney fees, will be paid into the state treasury.

Under subsection (f) of the statute, in a case in which the cause of action does not arise from product liability, but it is determined that the defendant acted or failed to act with the "specific intent to cause harm," there is no limitation on the amount of punitive damages which can be awarded.

Subsection (g) provides that in all tort actions which do not involve product liability, and in which the defendant did not act or fail to act with specific intent to cause harm, "the amount [of punitive damages] which may be awarded in the case shall be limited to a maximum of $250,000."

The clearly stated purpose of the statute is to punish and deter the defendant in a tort action. Subsection (a). The statute emphatically provides that punitive damages are not to be awarded as compensation to the plaintiff. Subsection (c). With regard to product liability actions, subsection (e)(1) effectuates those purposes by providing no ceiling on the amount of punitive damages which may be awarded. However, this punishment is limited by the fact that there may be only *one* such punishment meted out to a product liability defendant "regardless of the number of causes of action which may arise" from his conduct. *Id.* This limitation strongly enforces the legislature's stated intent that the purpose of the statute is to punish the defendant, and not to provide compensation or, in our view, a windfall to an individual plaintiff. Rather, we think that the purpose of this subsection is to authorize punishment of a defendant who has the potential to greatly damage society at large. The statute furthers this purpose by not allowing the first plaintiff to reach the courthouse with a product liability lawsuit to

reap a windfall from the punitive damages, but instead requiring that three-quarters of the punitive damages awarded be paid into the state treasury for the benefit of all Georgia citizens. Punishment and deterrence of the defendant, being the purposes of the subsection, it is insignificant under the statute that the plaintiff does not receive the full award.

It can be seen that subsections (e), (f) and (g) constitute a consistent statutory scheme for the regulation of punitive damages. In a case in which the cause of action arises from product liability, the risk falls on society as well as on the individual plaintiff who has been harmed. Because of the potential ability to damage numerous citizens, the defendant may be punished by the imposition of unlimited damages, but this may occur only one time. As we stated in *Hospital Auth. v. Jones*, 261 Ga. 613, 615, 409 S.E.2d 501 (1991), with regard to an award of punitive damages, "[s]ociety's interest [is] better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided." As the risk and harm are distributed between the individual plaintiff and all citizens of Georgia, the legislature has seen fit to distribute a portion of the damages awarded to those at potential risk – all citizens of the state. We note that there is no compelling reason to allow the only plaintiff permitted to litigate the punitive damages issue in court to retain all the punitive damages award, while future plaintiffs bringing identical causes of action will not be entitled to seek awards of punitive damages.

In a case in which the cause of action does not arise from product liability, but the defendant acted or failed to

act with the specific intent to cause harm, the legislature has set no limit on the amount of punitive damages. Subsection (f). This is so because the defendant, acting with great culpability, placed an individual at risk. In this instance the individual is entitled to retain all punitive damages awarded him.

The final tier of the statute involves neither product liability nor specific intent to harm. In this type case the individual plaintiff, rather than society, is harmed, but the legislature has determined that, absent specific intent to harm, there are public policy reasons which dictate that a cap should be placed on punitive damages. We have previously held that the legislature may lawfully circumscribe punitive damages in this circumstance. *Bagley v. Shortt*, 261 Ga. 762, 410 S.E.2d 738 (1991).

Thus, the appellant is correct in its assertion that defendants in various tort actions are treated differently, and the trial court was correct in its finding that the statute treats plaintiffs in various tort actions differently. However, all *similarly situated* plaintiffs and defendants, including those in product liability actions, are treated equally by the statute. We conclude that subsection (e) is not arbitrary, and therefore reverse the trial court's finding that subsection (e)(2) violates equal protection. *C.W. Matthews, Contracting v. Gover*, 263 Ga. 108, 428 S.E.2d 796 (1993); *Allrid*, supra. We further hold that the trial court did not err in rejecting appellant's claim that subsection (e)(1) violates equal protection principles.

(b) Because the trial court erroneously concluded that the purpose of OCGA § 51-12-5.1 is revenue raising, the trial court erred in holding that the statute is [sic]

violates Ga. Const. Art. III, Sec. V., Par. III, providing that no bills shall contain subject matter different from that expressed in the title. *American Booksellers Ass'n v. Webb,* 254 Ga. 399, 329 S.E.2d 495 (1985).

(c) Likewise, the trial court erred in holding that subsection (e)(2), which requires that seventy-five percent of the punitive damages awarded in a product liability case be paid to the state, constitutes a taking under the Fifth and Fourteenth Amendments to the United States Constitution. A plaintiff has no vested property right in the amount of punitive damages which can be awarded in any case, and the legislature may . . . lawfully regulate the amount of punitive damages which can be awarded. *Teasley v. Mathis,* supra; *Bagley v. Shortt,* supra; *Kelly v. Hall,* supra.

3. At trial appellees were permitted to offer evidence that, prior to the incident which gave rise to this litigation, Mack had received numerous complaints about cracks in the frame rails of the type tractor trailer truck driven by appellee Conkle. Appellant maintains that this evidence should not have been admitted because some of the cracks involved were dissimilar to the crack in the frame rail of Conkle's truck. We have reviewed the record in this case and conclude that the evidence admitted of frame cracks in numerous other Mack tractor trailer trucks is substantially similar to the frame crack in the truck at issue. This evidence was relevant to the issues of notice and punitive damages, and was properly admitted. *Skit Corp. v. Lugsdin,* 168 Ga.App. 754, 309 S.E.2d 921 (1983); *Gunthorpe v. Daniels,* 150 Ga.App. 113, 257 S.E.2d 199 (1979). We further note that the trial court refused to

admit evidence of frame cracks which were caused by circumstances wholly different from the one at issue.

4. Appellant argues that its motion for directed verdict on the issue of punitive damages should have been granted because there was no "clear and convincing evidence", as required by OCGA 51-12-5.1(b), to support the award.

The record in this case is replete with evidence showing that, for four years prior to the incident which gave rise to Conkle's injuries, Mack's engineering division repeatedly informed other divisions of the corporation that the frame rail on the type truck driven by Conkle was inadequate and should be replaced with a reinforced frame. The jury was authorized to find from the evidence presented that in each instance appellant ignored or rejected this advice, and that in 1984 and again in 1987, the marketing division of Mack vetoed a proposal by the engineering division to reinforce the frames on newly built trucks at a cost of $103. The record further shows that there was no notification to the purchasers of these trucks of the problems associated with the frame rails.

We conclude that this evidence, along with other evidence in the record, shows a "conscious indifference to consequences," and therefore meets the "clear and convincing" standard of OCGA § 51-12-5.1(b).

5. Last, appellant argues that the award of punitive damages is so excessive as to violate the due process clauses of the Georgia and United States Constitutions; the Eighth Amendment of the United States Constitution; and the excessive fines clause of the Georgia Constitution, Art. I, Sec. I, Par. XVII. We have held in *Hospital*

Auth. v. Jones, supra, and its predecessor, *Hospital Auth. v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989), that punitive damages are not unconstitutional for any of the reasons here alleged. In *Jones*, this court upheld a punitive damages award of $1.3 million where the award of nominal damages was $5000 on the ground that while, the actual harm done by the defendant was slight, "the potential to harm [others] supports the punitive damages award." 261 Ga. at 615, 409 S.E.2d 501. That rationale is applicable to this case. In conclusion, we hold that appellant has failed to show that this particular award is so excessive as to violate the constitutional principles raised.

Judgment affirmed in part and reversed in part.

All the Justices concur, except BENHAM, J., who concurs in the majority's affirmance of the award of punitive damages in case no. S93A0725 but dissents to Division 3(a) in case no. S93A0726.

BENHAM, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of the award of punitive damages in Case No. S93A0725. However, I must respectfully dissent to Division 3(a) in Case No. S93A0726, where the majority opinion reverses the trial court's determination that OCGA § 51-12-5.1(e)(2) is unconstitutional under the Equal Protection Clauses of the United States Constitution and the Constitution of the State of Georgia. For the purposes of this discussion, the Equal Protection guarantees of the Georgia Constitution under Art. I. Sec. I, Par. II, are coextensive with those of the United States Constitution. Thus, the same analysis is applicable to both provisions. *Ambles v. State*, 259 Ga. 406,

383 S.E.2d 555 (1989). Since no fundamental right or suspect class is involved, I am in agreement with the majority that the rational relationship test is applicable and that neither intermediate nor heightened scrutiny is required.

The issue we are required to decide is whether the legislature, in providing that 75% of punitive damages awards in products liability cases should go to the general fund of the state[1], violated the constitutional guarantee of Equal Protection. In considering whether a statute meets Equal Protection requirements, the test set out in *Clark v. Singer*, 250 Ga. 470, 298 S.E.2d 484 (1983), requires that the classification be rationally related to some legitimate governmental interest and that it "rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.*

Looking first to the classification established by this portion of the statute, I cannot agree with the majority that all similarly situated plaintiffs are treated equally.

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[1] OCGA § 51-12-5.1(e)(2) provides as follows: Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Fiscal Division of the Department of Administrative Services. Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages.

The majority opinion appears to limit the scope of "all similarly situated plaintiffs" to those plaintiffs seeking punitive damages in products liability cases. With regard to the confiscation by the State of 75% of a jury's award of punitive damages, the majority gives no reason, and I am aware of none, why all tort plaintiffs who seek punitive damages are not similarly situated. That being so, it is apparent that the statute creates a separate class of plaintiffs who base their suits (and their claims for punitive damages) on products liability, and treats them differently than other tort plaintiffs seeking punitive damages by taking three-fourths of the punitive damages awarded them.

Turning from the scope of the classification to the relation of that classification to a legitimate state interest, I note that the State has suggested four purposes to be served by the classification at issue: to facilitate business development, to avert an insurance crisis, to prevent windfalls, and to punish and deter defendants. Assuming for this discussion the legitimacy of those purposes, I still cannot find the disparate treatment of products liability plaintiffs to be rationally related to those purposes. While it is certainly arguable that the single award provision of OCGA § 51-12-5.1(e)(1) facilitates business development by ensuring that those whose negligence has put a defective product in the stream of commerce in Georgia will only be punished once, the diversion of the most of the punitive damages into the general fund of the State mandated by subsection (e)(2) does nothing for the defendant or for business development in general. With regard to the asserted crisis in the insurance industry, the situation here is the same as that in *McBride v. General Motors Corp.*,

737 F.Supp. 1563 (M.D.Ga.1990), where the District Court, considering constitutional challenges to OCGA § 51.12-5.1, found the record lacking in evidence that such a crisis exists. As for the prevention of windfalls, the provision for giving most of a punitive damages award to the State not only does not eliminate a windfall to the plaintiff, it gives a windfall to the State, which has not only done nothing to advance the litigation, but has not protected the public from defective products and will not be obliged to use the windfall to benefit those damaged by the same defective products. Finally, with regard to the punitive purpose of the provision for taking the greater part of the award and giving it to the State, I agree completely with what the Supreme Court of Colorado said in holding a similar statute unconstitutional,

> It goes without saying that placing the burden of payment on the judgment creditor who suffered the wrong bears no reasonable relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct.

Kirk v. Denver Publishing, 818 P.2d 262 (Colo.1991). Furthermore, I believe that by removing, or at least crippling, the financial incentive for private citizens to pursue vigorously contested claims for punitive damages, the punishment and deterrence purpose of punitive damages is greatly hindered. I conclude, therefore, that the confiscatory provisions of OCGA § 51-12-5.1(e)(2) cannot fairly be said to be rationally related to any legitimate state interest. Accordingly, I would hold that the statute violates the Equal Protection guarantees of the Constitutions of the United State [sic] and Georgia.

While the issue presented to us in this case is a matter of first impression for this court, it is a matter that has been specifically addressed by the United States District Court for the Middle District of Georgia (*McBride*, supra) and generally addressed by three other courts. Only four other states have statutes similar to ours (Florida, Iowa, Illinois, and Colorado), and only three of those statutes have been challenged. Florida and Iowa, both of which require that the portion of a punitive damages award taken by the state be paid into a special state fund, have held their statutes constitutional. *Gordon v. State of Florida*, 608 So.2d 800 (Fla.1992); and *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612 (Iowa 1991). Colorado's statute is more closely akin to Georgia's statute, and that state has declared its statute unconstitutional, *Kirk*, supra. While this court is not bound by the United States District Court's decision in *McBride*, supra, that our statute is unconstitutional, or by the reasoning of the Colorado Supreme Court in declaring its similar statute unconstitutional, I find the reasons expressed in both those decisions highly persuasive. For the reasons stated in those cases and the reasons I have set out above, I am convinced that OCGA § 51-12 5.1(e)(2) denies equal protection of the laws and is, therefore, unconstitutional.

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

THOMAS A. MOSELEY and ELAINE F. MOSELEY, as administrators of the estate of SHANNON CHRISTOPHER MOSELEY, and THOMAS A. MOSELEY and ELAINE F. MOSELEY, as parents and sole survivors of SHANNON CHRISTOPHER MOSELEY,	)	CIVIL ACTION FILE NO. 90V6276
Plaintiffs,	)	
v.	)	
GENERAL MOTORS CORPORATION, and DAVID GERARD RUPRECHT,	)	
Defendants.	)	

FINAL JUDGMENT

(Filed Feb. 25, 1993)

This case came on for trial January 4, 1993. After hearing evidence and argument, the jury retired to deliberate and rendered separate verdicts in each of the two phases of this trial. Those written verdicts are attached hereto as Exhibits "A" and "B," respectively. In accordance therewith, and in accordance with this Court's Order with respect to the constitutionality of O.C.G.A. § 51-12-5.1(e), the Court enters this Final Judgment in the above-captioned case.

IT IS CONSIDERED, ORDERED, AND ADJUDGED

(1) that plaintiffs Thomas A. Moseley and Elaine F. Moseley, as parents of Shannon Christopher Moseley, have and recover from Defendants General Motors Corporation and David Gerard Ruprecht, jointly and severally, the sum of $4,241,611.84;

(2) that plaintiffs Thomas A. Moseley and Elaine F. Moseley, as administrators of the estate of Shannon Christopher Moseley, have and recover from Defendants General Motors Corporation and David Gerard Ruprecht, jointly and severally, the sum of $1.00;

(3) that plaintiffs Thomas A. Moseley and Elaine F. Moseley, as administrators of the estate of Shannon Christopher Moseley, have and recover from Defendant General Motors Corporation the additional sum of $101,000,000;

(4) that plaintiffs Thomas A. Moseley and Elaine F. Moseley, as administrators of the estate of Shannon Christopher Moseley, have and recover from Defendant General Motors Corporation pre-judgment interest in the amount of $1,568,223.36; and

(5) that this judgment shall bear interest at the legal rate of 12% from this date.

On motion by Defendant General Motors Corporation, this Court further orders that the total liability of Defendants General Motors Corporation and David Gerard Ruprecht be reduced by $1,000,000, the amount previously received by plaintiffs in settlement with a former defendant in this action, now dismissed as a defendant.

SO ORDERED, this 26 day of February, 1993.

/s/ Albert L. Thompson
Albert L. Thompson
JUDGE, STATE COURT OF
FULTON COUNTY

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

THOMAS A. MOSELEY and ELAINE F. MOSELEY, as administrators of the estate of SHANNON CHRISTOPHER MOSELEY, and THOMAS A. MOSELEY and ELAINE F. MOSELEY, as parents and sole survivors of SHANNON CHRISTOPHER MOSELEY,	)	CIVIL ACTION FILE NO. 90V-6276
Plaintiffs,	)	
vs.	)	
GENERAL MOTORS CORPORATION, and DAVID GERARD RUPRECHT,	)	
Defendants.	)	

VERDICT

(Filed Feb. 4, 1993)

I. ESTATE CLAIM

Compensatory Damages Claim for pain and suffering against General Motors Corporation and David Gerard Ruprecht

We the Jury find for:

Plaintiffs Thomas A. and Elaine F. Moseley, as Administrators of the Estate of Shannon Christopher Moseley against Defendant(s) General Motors Corp. & David Gerard Ruprecht

in the amount of $ 1^{00} .

OR

We the Jury find for the Defendant(s)

General Motors Corporation _____

David Gerard Ruprecht _____

II. WRONGFUL DEATH CLAIM

Compensatory Damage Claim for the full value of the life of Shannon Christopher Moseley

We the Jury find for:

Plaintiffs Thomas A. and Elaine F. Moseley, as parents and sole Survivors of Shannon Christopher Moseley, against the defendant(s) General Motors Corporation & David Gerard Ruprecht

in the amount of $ 4,241,611.84 .

OR

We the Jury find for the Defendant(s)

General Motors Corporation _____

David Gerard Ruprecht _____

III. PUNITIVE DAMAGE CLAIM AGAINST GENERAL MOTORS CORPORATION

Punitive Damages Special Interrogatory to Jury

Should Punitive Damages be assessed and levied against General Motors Corporation? ([Yes] or No)

Yes

/s/ Otis L. Rowon
FOREPERSON

2-4-93
DATED

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

THOMAS A. MOSELEY and ELAINE F. MOSELEY, as administrators of the estate of SHANNON CHRISTOPHER MOSELEY, and THOMAS A. MOSELEY and ELAINE F. MOSELEY, as parents and sole survivors of SHANNON CHRISTOPHER MOSELEY,	)	CIVIL ACTION FILE NO. 90V-6276
Plaintiffs,	)	
vs.	)	
GENERAL MOTORS CORPORATION, and DAVID GERARD RUPRECHT,	)	
Defendants.	)	

VERDICT

(Filed Feb. 4, 1993)

We the jury find: For the Plaintiffs in the amount of $101,000,000 .

This 4 day of Feb. , 1993.

/s/ Otis L. Rowon
FOREPERSON

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

THOMAS A. MOSELEY and ELAINE F. MOSELEY, as administrators of the estate of SHANNON CHRISTOPHER MOSELEY, and THOMAS A. MOSELEY and ELAINE F. MOSELEY, as parents and sole survivors of SHANNON CHRISTOPHER MOSELEY,	)	CIVIL ACTION FILE NO. 90V6276
Plaintiffs,	)	
v.	)	
GENERAL MOTORS CORPORATION, and DAVID GERARD RUPRECHT,	)	
Defendants.	)	

ORDER

(Filed Feb. 26, 1993)

This matter comes before the Court on plaintiffs' Motion To Have The Georgia Products Liability Punitive Damages Statute, O.C.G.A. § 51-12-5.1(e), Declared Unconstitutional. In their motion, plaintiffs have challenged the constitutionality of O.C.G.A. § 51-12-5.1(e), which provides that only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability and that seventy-five percent of any punitive damages awarded shall be paid into the state treasury. O.C.G.A. § 51-12-5.1(e)(1) and (e)(2). Plaintiffs

base their constitutional challenge on numerous state and federal grounds:

(1) plaintiffs challenge the constitutionality of the one-award provision on due process and equal protection grounds under both the state and federal constitutions, the right to a jury trial and access to courts under both the state and federal constitutions and as a special law or grant of special privileges or immunities prohibited by the state constitution.

(2) plaintiffs challenge the judgment creditor status of the State as to 75% of a product liability punitive damage award under the due process and equal protection provisions of the state and federal constitutions, and under the excessive fines provision of state and federal constitutions, and under the state constitutional provisions providing the right to a jury trial and access to courts and that no bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof, and under the separation of powers provision of the state constitution.

(3) plaintiffs challenge that part of the punitive damages statute conferring judgment creditor status upon the State because it effects a forced taking of the judgment for public use without just compensation, thus violating federal and state constitutional proscriptions against the taking of private property.

After a full review of the briefs, responses, and other documents submitted, and without reaching each and every one of the constitutional infirmities alleged by the plaintiffs, the Court finds:

(1) That the one-award provision (O.C.G.A. § 51-12-5.1(e)(1)) challenged by the plaintiffs is not ripe for decision at this time. There has been no evidence presented to the Court showing that the plaintiffs are not the first claimants to seek and recover punitive damages in a court of this State for the defects alleged in this case. The Court declines at this time to rule that the one-award provision is or is not constitutional.

(2) That the part of the statute conferring judgment creditor status on the State and providing that 75% of any punitive damages award shall be paid to the State (O.C.G.A. § 51-12-5.1 (e)(2)) is patently unconstitutional under the federal and state equal protection clauses and the state and federal takings clauses. *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Conkle v. Interstate Truck Leasing, Inc. et al.*, Civil Action File No. 90SV-268 (State Court of Spalding County) (Order of October 16, 1992). The Court also finds that the seventy-five percent provision violates the "single subject matter" requirement of the Georgia Constitution. *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990). The Court further finds that the seventy-five percent provision unconstitutionally impinges upon the plaintiffs right to trial by jury and access to courts. Ga. Const., art. I, § I, ¶ XI (right to jury trial); art. I, § I, ¶ XII (right to access to courts).

The seventy-five percent provision discriminates between products liability plaintiffs and other tort plaintiffs. All plaintiffs who recover punitive damages, except products liability plaintiffs, are allowed to keep one hundred percent of their punitive damages judgment. Indeed,

in cases brought under O.C.G.A. § 51-12-5.1(f), the plaintiff is allowed to keep one-hundred percent of an unlimited punitive damages award. This discrimination against products liability plaintiffs is arbitrary and bears no rational or reasonable relation to any valid State interest.

The seventy-five percent provision also constitutes an improper "taking" under the Fifth Amendment to the United States Constitution and the Georgia Constitution. Once the jury has rendered its verdict and a judgment has been entered, the plaintiffs have a valid property interest in the judgment. The State recognizes this, specifically disclaiming any interest in the action or judgment until the judgment issues. Once it issues, however, the State ostensibly becomes a judgment creditor and takes seventy-five percent of the judgment away from the plaintiff. This results in a taking by the State of seventy-five percent of the plaintiffs' private property "for public use, without just compensation." U.S. Const., Amend. 5.

As the courts in *McBride* and *Conkle* noted, the seventy-five percent provision is not to [sic] confused with those statutes at issue in cases such as *Teasley v. Mathis*, 243 Ga. 561, 255 S.E.2d 57 (1979). *McBride*, 737 F.Supp. at 1574-75; *Conkle*, Slip Op. at 5. First, the statutes at issue in those cases dealt with the outright abolition of the availability of punitive damages for certain classes of plaintiffs before they ever filed suit. *Cf. Bagley v. Shortt*, 261 Ga. 762, 410 S.E.2d 738 (1991). There were no judgments and no vested property interests. Moreover, the plaintiffs deprived of certain rights or punitive damages in the no-fault statute and workers compensation statutes were given a *quid pro quo*. As the court in *McBride* noted:

> Workers compensation statutes eliminate the claimant's burden of proving fault in return for protection to the employer. The no-fault statute provides for prompt payment without proof of fault in return for a "serious injury" threshold and mandatory insurance coverage. However, such a *quid pro quo* does not exist in Georgia's punitive damages statute.

737 F. Supp. at 1575.

As noted above, the seventy-five percent provision also violates the Georgia single-subject matter rule. Ga. Const., art. III, § V, ¶ III. That constitutional provision requires that "no bills shall pass which refer to more than one subject matter or contain matter different from what is expressed in the title thereof." The Court adopts the reasoning set out in *McBride* and *Conkle*. The amendatory act establishing the seventy-five percent provision related specifically to "torts." That was the single subject matter of the act. Yet, the Legislature included in the act a provision to raise public revenue from products liability punitive damage judgments for the State's general fund. It is, therefore, unconstitutional.

The plain language of the Georgia Constitution provides that the "right to a jury trial shall remain inviolate. . . . " Ga. Const., art. I, § 1, ¶ 11. The term "inviolate" means deserving of the highest protection. If the State takes any portion of the jury's award away from plaintiffs after the jury has awarded it to them, then it has certainly interfered with the plaintiffs' right of access to the courts. Because the seventy-five percent provision violates the right to trial by jury and access to courts, this Court finds that it is unconstitutional.

Having declined to rule on O.C.G.A. § 51-12-5.1(e)(1) and having found O.C.G.A. § 51-12-5.1(e)(2) unconstitutional, the Court finds that the seventy-five percent provision can be stricken in its entirety and the one-award provision left intact. O.C.G.A. § 1-1-3.

Because it is this Court's constitutional duty to do so, the Court hereby grants plaintiffs' motion in part and declares O.C.G.A. § 51-12-5.1(e)(2) void and invalid. The full punitive damages verdict awarded against Defendant General Motors Corporation shall, upon entry of judgment, be awarded to the plaintiffs and they are not to suffer any claim of the Fiscal Division of the Department of Administrative Services of the State of Georgia.

SO ORDERED, this 26 day of February, 1993.

/s/ Albert Thompson
Albert L. Thompson, Judge
State Court of Fulton County

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

THOMAS A. MOSELEY and ELAINE F. MOSELEY, as administrators of the estate of SHANNON CHRISTOPHER MOSELEY, and THOMAS A. MOSELEY and ELAINE F. MOSELEY, as parents and sole survivors of SHANNON CHRISTOPHER MOSELEY Plaintiffs, v. GENERAL MOTORS CORPORATION, and DAVID GERARD RUPRECHT, Defendants.	)	CIVIL ACTION FILE NO. 90V6276

ORDER NUNC PRO TUNC AMENDING FINAL JUDGMENT DATED FEBRUARY 26, 1993 BY STRIKING THE AWARD OF PREJUDGMENT INTEREST

(Filed April 15, 1993)

General Motors having moved to strike the award of prejudgment interest from the judgment dated February 26, 1993, and that motion having been fully briefed and argued, the Court finds as follows:

1. Plaintiffs are entitled to prejudgment interest under O.C.G.A. § 51-12-14(d) only if the *compensatory* damages awarded by the jury exceed the amount demanded by plaintiffs in their unliquidated damages demand.

2. In applying O.C.G.A. § 51-12-14(d), the Court will not consider any award of punitive damages.

3. Here plaintiffs' unliquidated damages demand was for $5,000,000 and the jury awarded $4,240,612.84 in compensatory damages.

4. Accordingly, the judgment for compensatory damages did not exceed plaintiffs' unliquidated damages demand, and plaintiffs are not entitled to prejudgment interest.

5. Therefore, the final judgment dated February 26, 1993 will be amended *nunc pro tunc* by striking that portion of the judgment awarding $1,568,223.36 in pre-judgment interest. The amended judgment is attached hereto.

This 15 day of April, 1993.

/s/ A.L. Thompson
Honorable A. L. Thompson
JUDGE, STATE COURT OF
FULTON COUNTY

STATUTORY PROVISIONS

Col. Rev. Stat. § 13-21-102. Exemplary damages

(1)(a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

. . .

(4) One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

Fla. Stat. Ann. § 768.73. Punitive damages; limitation

(1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages

awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

. . .

(2) In any civil action, an award of punitive damages is payable as follows:

(a) Sixty-five percent of the award is payable to the claimant.

(b) If the cause of action was based on personal injury or wrongful death, 35 percent of the award is payable to the Public Medical Assistance Trust Fund; otherwise, 35 percent of the award is payable to the General Revenue Fund.

(3) The clerk of the court shall transmit a copy of the jury verdict to the State Treasurer by certified mail. In the final judgment, the court shall order the percentages of the award, payable as provided in subsection (2).

(4) A settlement agreement entered into between the original parties to the action after a verdict has been returned must provide a proportionate share payable to the fund specified in paragraph (2)(b). For purposes of this subsection, a proportionate share is a 35-percent share of that percentage of the settlement amount which the punitive damages portion of the verdict bore to the total of the compensatory and punitive damages in the verdict.

(5) The Department of Banking and Finance shall collect or cause to be collected all payments due the state

under this section. Such payments are made to the Comptroller and deposited in the appropriate fund specified in subsection (2).

(6) If the full amount of punitive damages awarded cannot be collected, the claimant and the other recipient designated pursuant to paragraph (2)(b) are each entitled to a proportional share of the punitive damages collected.

Ill. Rev. Stat. Ch. 110 ¶ 2-1207. Punitive damages

s 2-1207. Punitive damages. The trial court may, in its discretion, with respect to punitive damages, determine whether a jury award for punitive damages is excessive, and if so, enter a remittitur and a conditional new trial.

The trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Rehabilitation Services. The amount of the award paid from the punitive damages to the plaintiff's attorney shall be reasonable and without regard to any contingent fee contract, except that such amount shall not exceed the amount authorized by the contingent fee contract. In apportioning punitive damages as provided in this Section, the court shall consider, among other factors it deems relevant, whether any special duty was owed by the defendant to the plaintiff.

Iowa Code Ann. § 668A.1 Punitive or exemplary damages

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.

2. An award for punitive or exemplary damages shall not be made unless the answer of finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer of finding is affirmative, the jury, or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damages shall be ordered paid as follows:

a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator.

Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

Kan. Stat. Ann. § 60-3402. Exemplary or punitive damages; procedure; proof; limitations; disposition of damages recovered; application limited.

(a) In any medical malpractice liability action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted to the court to determine the amount of such damages to be awarded.

. . .

(d) No award of exemplary or punitive damages shall exceed the lesser of: (1) Twenty-five percent of the annual gross income earned by the party against whom the damages are awarded from professional services as a health care provider, as determined by the court based upon the party's highest gross annual income earned from such services for any one of the five years immediately before the act for which such damages are awarded; or (2) three million dollars.

(e) If exemplary or punitive damages are awarded pursuant to this section, 50% of such damages recovered and collected shall be paid to the party awarded them

and 50% shall be paid to the state treasurer for deposit in the state treasury and shall be credited to the health care stabilization fund established pursuant to K.S.A. 40-3403 and amendments thereto.

Mo. Ann. Stat. § 537.675

536-675 Tort victims' compensation fund established – punitive damage award percentage to go into fund – collection, disbursement and procedures to be established by general assembly.

1. There is created the "Tort Victims' Compensation Fund". Unexpended moneys in the fund shall not lapse at the end of the biennium as provided in section 33.080 RSMo.

2. Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed rendered in favor of the state of Missouri. The circuit clerks shall notify the attorney general of any final judgment awarding punitive damages rendered in their circuits. With respect to such fifty percent, the attorney general shall collect upon such judgment, and may execute or make settlements with respect thereto as he deems appropriate for deposit into the fund.

3. The state of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding under this section.

N.Y. C.P.L.R. § 8701. Punitive damages

1. In any civil action resulting in an award of punitive damages to a private party, other than an award rendered against the state, upon expiration of the time to appeal or the exhaustion of available appeals, twenty percent of such punitive damage award shall be payable to the state, and the judgment shall order payment accordingly.

2. When, due either to the expiration of the time to appeal or the exhaustion of available appeals, such judgment is no longer subject to appeal, the state shall have all rights due a judgment creditor until such judgment is satisfied.

Or. Rev. Stat. § 18.540

18.540. PUNITIVE DAMAGES; distribution; order of application.

(1) Upon the entry of a judgment including an award of PUNITIVE DAMAGES, the Department of Justice shall become a judgment creditor as to the PUNITIVE DAMAGES portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (c) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

(a) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.

(b) One-half of the remainder shall be paid to the prevailing party.

(c) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

(2) The party preparing the proposed judgment shall assure that the judgment identifies the judgment creditors specified in subsection (1) of this section.

(3) Upon the entry of a judgment including an award of PUNITIVE DAMAGES, the prevailing party shall provide notice of the judgment to the Department of Justice.

(4) Whenever a judgment includes both compensatory and PUNITIVE DAMAGES, any payment on the judgment by or on behalf of any defendant, whether voluntary or by execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to PUNITIVE DAMAGES awarded against that defendant unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

(5) Whenever any judgment creditor of a judgment which includes PUNITIVE DAMAGES governed by this section receives any payment on the judgment by or on behalf of any defendant, the judgment creditor receiving

the payment shall notify the attorney for the other judgment creditors and all sums collected shall be applied as required by subsections (1) and (4) of this section, unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

Utah Code Ann. § 78-18-1

78-18-1 Basis for punitive damages awards – Section inapplicable to DUI cases – Division of award with state.

(1)(a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

. . .

(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

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(2)

No. 93-1508

Supreme Court, U.S.
FILED
APR 14 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

THOMAS A. MOSELEY and ELAINE F. MOSELEY,

Petitioners,

vs.

STATE OF GEORGIA,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF OF RESPONDENT STATE OF GEORGIA IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Georgia properly held that the state's punitive damages apportionment law, O.C.G.A. § 51-12-5.1(e)(2), satisfied due process requirements where the property interests of private parties and the state simultaneously accrue and punitive damages do not contain any compensatory element under Georgia law?

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N.Y. C.P.L.R. § 8701 16

Or. Rev. Stat. § 18.540 16

Utah Code Ann. § 78-18-1 16

STATEMENT OF THE CASE

Beginning July 1, 1987, awarding punitive damages in Georgia underwent a dramatic change in a number of respects. To clarify that punitive damages were merely a form of deterrence and punishment, all compensatory elements were removed from such awards. O.C.G.A. § 51-12-5.1(c). Having allowed for full compensation to injured plaintiffs, the state legislature, the General Assembly, enacted a statutory cap of $250,000.00 on punitive damage awards to limit the perceived windfall received by some claimants. O.C.G.A. § 51-12-5.1(g). No statutory cap was placed on actions where the plaintiff proved that a defendant acted out of a specific intent to harm. O.C.G.A. § 51-12-5.1(f). In product liability cases, no cap was imposed, but 75 percent of any punitive damages awarded are payable to the state, less a proportionate amount for the costs of litigation, including reasonable attorneys' fees. O.C.G.A. § 51-12-5.1(e)(2).

The statute at issue here was adopted in 1987 as a part of tort reform in Georgia. *See* 1987 Ga.L. p. 915-16. Since the cause of action in this case arose after July 1, 1987 (the accident at issue occurred in 1989), any claim to a recovery of punitive damages is governed by and limited to what is permitted under current statutory provisions. There is no retroactivity issue in this appeal. The preamble to the tort reform legislation establishes that the legislature intended a comprehensive re-structuring of the method by which punitive damages were treated in the courts of Georgia. *Id.* One goal of tort reform was to improve the public's confidence in the legal system by eliminating the public perception that excessive windfalls have been awarded to select individuals. Another was to

avoid proliferation of litigation based upon speculative lawsuits.

The lawsuit *sub judice* was filed by Thomas and Elaine Moseley (hereafter collectively "Petitioners") to recover for the death of their son, Shannon Moseley. Mr. Moseley was killed in a traffic accident when the vehicle in which he was riding, a General Motors pick-up truck, burst into flames after it was struck by another car. Petitioners alleged that the vehicle, which was designed with "side-saddle" gasoline tanks located outside the chassis, was defective. On February 4, 1993, after a trial on the merits, a Fulton County jury found for Petitioners on their compensatory damage claim in the amount of $4,241,611.84, representing "the full value of the life of Shannon Christopher Moseley". (Petition, A24). The jury also awarded Petitioners $1.00 on their claim for the pain and suffering of their son prior to his death. (Petition, A23). Finally, in reliance upon Georgia's punitive damage statute, the jury found General Motors deserving of punishment under the statutory criteria and assessed $101,000,000.00 in punitive damages against General Motors. (Petition, A25). It is only this latter award which is at issue in this appeal.

Although Petitioners filed a pretrial motion seeking to declare O.C.G.A. § 51-12-5.1(e)(2) unconstitutional, they did not obtain a ruling on that motion prior to invoking the statute at trial to secure a recovery. (Petition, p. 3 n.3). The State of Georgia filed a brief in opposition to the Petitioners' motion on February 23, 1993, and additionally sought leave of the court to intervene in the action and for an apportionment of the punitive damages prior to issuance of judgment. (Petition, p. 3 n.3). After

the jury's substantial punitive damages award, and simultaneous with the entry of judgment on that award, the Fulton Superior Court declared the statute unconstitutional *inter alia* as violative of the Takings Clause of the federal constitution. (Petition, A28). The State appealed this decision.

After a thorough review of the legal arguments and the record, and after receiving briefs of numerous *amici curiae* on the constitutional questions, the Georgia Supreme Court rejected the trial court's analysis and upheld the statute as constitutional as against all challenges. (Petition, A2-4.) Reconsideration of that decision was denied on December 17, 1993, (Petition, A1), and this petition followed.

All questions of the propriety of the jury's award, apart from the constitutionality of the statute, were severed and remain pending in the Court of Appeals of Georgia, Case Nos. A94A0826, A94A0827. Thus, the question of whether the punitive damages judgment will withstand appellate scrutiny has not been resolved. Accordingly, the present case may become moot given that Petitioners' interest in the punitive damages judgment and that of the Respondent State of Georgia is subject to divestiture at any time. Under such circumstances, the Court may wish to defer any consideration of the Petition until such time as there exists an unfettered right to a recovery under the judgment. See *Asarco, Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989).

SUMMARY OF THE ARGUMENT

Petitioners challenge the Georgia law which authorizes an apportionment of punitive damages awards between plaintiffs and the state. O.C.G.A. § 51-12-5.1(e)(2). This statute became effective July 1, 1987, prior to the accrual of Petitioners' claim, as a part of comprehensive tort reform legislation. The Georgia legislation expressly removed all compensatory elements from punitive damage awards. The sole purpose of punitive damages in Georgia now is to punish and deter wrongful conduct, not to compensate a plaintiff. A Fulton County jury awarded Petitioners $4,241,611.84, representing "the full value of the life of Shannon Christopher Moseley". (Petition, A24). It is undisputed that Petitioners received complete relief on their compensatory claims. Only the punitive damages award is at issue here.

In asking this Court to grant certiorari, Petitioners argue that the timing of the apportionment results in a "taking" violative of due process. Petitioners suggest that the apportionment statute only comes into play upon entry of judgment, implying that their initial claim included the portion of the award retained by the state. In reality, the statute defines the claim from the outset. The total claim held by Petitioners is a compensatory claim and a claim for 25 percent of any punitive damage recovery. They never had any property interest in the remaining 75 percent of the punitive damages award, just as other tort plaintiffs have no property interest in any portion of an award exceeding the statutory cap of $250,000.00. O.C.G.A. § 51-12-5.1(g). There is no taking to invoke due process principles because the Petitioners never had a claim to, nor a right to payment of, the

totality of the punitive damages award in this case. Consequently, the decision of the Supreme Court of Georgia does not conflict with any decisions of this Court applying the Takings Clause of the Fifth Amendment.

In addition, there exists no conflict among state court decisions to warrant issuance of a writ of certiorari. To date, the courts of three states have approved apportionment statutes relating to punitive damages: Florida, Georgia, and Iowa. One state has disapproved an apportionment statute: Colorado. The Colorado statute contained a flaw in that the state's interest in the award was triggered *after* judgment in favor of the plaintiff, and was found to amount to a confiscation of a property right already vested in the plaintiff by virtue of the judgment. The other statutes do not contain this flaw. Simply because different outcomes result does not signal that the courts are in conflict or have applied disparate reasoning. Due process principles have been applied uniformly; the Colorado statute merely failed to pass muster when tested according to those principles.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

Petitioners invite this Court to accept jurisdiction of this appeal on the pretext of resolving matters of substantial public importance. Upon examination of the precedent and authorities set forth within, it is apparent that there is no need for this Court to review the opinion of the Georgia Supreme Court which decided this case in accordance with well-settled constitutional principles.

The Takings Clause argument advanced by Petitioners under the Fifth and Fourteenth Amendments to the U.S. Constitution must fail when it is realized that no compensatory element of damages is apportioned to the state, and that Petitioners' interest in a cause of action does not include the portion of a punitive damages award retained by the state. Quite simply, there is no taking.

Petitioners also predicate certiorari on a conflict in state authorities. The asserted conflict in state decisions does not materialize when the statutes in those decisions are comparatively analyzed. The Georgia punitive damages apportionment statute, O.C.G.A. § 51-12-5.1(e)(2), shares the characteristics of those statutes already upheld against like challenges, whereas the remaining statute is distinguishable. Consequently, what appears to be a conflict at first blush is in actuality a consistent application of the law tailored to different statutory schemes. With regard to the aberrational Georgia federal district court decision, *McBride v. General Motors Corp.*, 737 F. Supp. 2563 (M.D. Ga. 1990) that case lacked the full development of the issues undertaken here and would have been an excellent opportunity for the exercise of the district court's discretion to abstain given that no Georgia appellate court had spoken to the statute at the time of its ruling and that significant state public policy issues were presented. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Capitol Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555 (N.D. Ga. 1991).

Although lacking in precedential value, it is worthy of note that this Court recently declined to grant certiorari in a case where the constitutionality of a similar

apportionment statute was squarely presented. *Gordon v. State*, 608 So.2d 800 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1647, 123 L.Ed.2d 268 (1993). In that case, as here, the lower court upheld the statute. Respondent submits that nothing has legally changed to warrant this Court's action since the denial of certiorari in that case, other than the fact that yet another appellate court has approved the constitutional appropriateness of such statutes.

II. THE TAKINGS CLAUSE CASES CITED BY PETITIONERS ARE INAPPOSITE SINCE PUNITIVE DAMAGES ARE NOT COMPENSATORY IN GEORGIA AND PETITIONERS RECEIVE THE FULL VALUE OF THEIR CAUSE OF ACTION AS DEFINED BY STATE LAW.

A. State Law Defines What Property Belongs To Petitioners And No Taking Has Occurred In This Case As All Rights Vested Simultaneously.

In order to demonstrate to this Court that they are entitled to due process protections, Petitioners must first show a state law basis for a claim to the portion of the punitive damages award to be retained by the state under Georgia's apportionment law. The Fourteenth Amendment to the United States Constitution does not create any property rights, *United States v. Cruikshank*, 92 U.S. 542, 554 (1875), rather it merely safeguards rights that exist by virtue of some other legal source. As this Court held in *Board of Regents v. Roth*, 408 U.S. 564 (1972):

> Property interests, of course, are not created by the Constitution. Rather, they are created and

> their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. Thus, the first question for this Court is whether Petitioners have any property interest in the full punitive damages award in this case.

Under Georgia's punitive damages statute, the totality of an award never becomes private property because the plaintiff obtains a limited property interest in punitive damages at the time the cause of action accrues. Petitioners must concede that on the date their cause of action arose, Georgia's apportionment statute was already in effect. Had they gone to the statute on that date, and read the provision that the State was entitled to receive 75 percent of any punitive damages recovery, less a proportionate share of litigation costs, there could be no doubt that state law provided them a cause of action for a compensatory recovery, a recovery of 25 percent of any punitive damages award, and a proportionate share of litigation costs. Petitioners never had a claim for, or even an expectation of, a full recovery of any punitive damages judgment.

Petitioners also premise their "takings" argument on that feature of the apportionment statute which affords them a priority for the collection of compensatory damages. Plaintiffs receive payment of compensatory damages before the state may receive its share of a punitive damages award. But the timing of the payments under the judgment does not alter the constitutional analysis since both Petitioners and the state obtain the right to

payment at the same time: when judgment is entered. The state's enforcement of that right is merely postponed. The legislature's policy determination that plaintiffs should collect compensatory damages first does not lessen the state's interest in the punitive damages judgment or mean that the underlying rights to payment arise in a staggered fashion rather than simultaneously.

Petitioners omit this entire analysis from their petition to the Court. Petitioners would prefer to have this Court conclude that they maintain ownership of the entire cause of action until entry of judgment, and that the State then divests them of that property. That is not the law of Georgia. Furthermore, requesting punitive damages in a civil action is a voluntary act, and in relying on the Georgia statute to effect a recovery, Petitioners are bound by the limited recovery that the statute permits: 25 percent of any punitive damages recovery plus a proportionate share of litigation costs, and nothing more. In fact, their decision to invoke the statutory machinery for punitive damages should be deemed a waiver of the right to contest the constitutionality of the statute. *Smith v. Miller*, 261 Ga. 560, 407 S.E.2d 727 (1991) (voluntary participation in retirement program constituted waiver of constitutional challenge).

Plainly then, Petitioners' reliance on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), is misplaced. In that case, this Court in a narrow holding, decreed that a state may not charge private parties both a fee for court services and retain interest on funds deposited into the registry of court. *Id.* at 164-65. The significant distinction between that case and the one now before the Court is that interest on funds interpleaded into court

derives from funds which belong to the parties. Punitive damages under Georgia's statute are not derived from or related to compensatory damages, in the sense that they are not meant to compensate a plaintiff for wounded feelings or some other "damage". The sole purpose of punitive damages in Georgia is to punish and deter wrongful conduct, not to enrich or compensate a plaintiff. Thus, any claim of a derivative property interest arising out of the underlying liability judgment is impossible.

Since the respective interests of the state and the Petitioners vest simultaneously, and the state's interest is not derivative of the Petitioner's claim, there is no taking and the *Webb* decision is not controlling here. It is axiomatic that due process must be afforded only if the state seeks to deprive or divest a citizen of a vested interest, not when it re-defines that interest before the interest vests. *See e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Bagley v. Shortt*, 261 Ga. 762, 410 S.E.2d 738 (1991), the Georgia Supreme Court upheld the $250,000.00 cap on punitive damages in non-product liability cases holding:

> If punitive damages lawfully may be eliminated, as we held in *Teasley v. Mathis*, 243 Ga. 561 (255 S.E.2d 57) (1979) (constitutionality of elimination of exemplary damages under no-fault automobile insurance law is not violative of due process, equal protection, or right of access to the courts); then they lawfully may be circumscribed, as by O.C.G.A. § 51-12-5.1(g).

Id. at 762. This holding is equally applicable to subsection (e)(2) containing the 75 percent apportionment provision. Petitioners' right to recover punitive damages is "circumscribed" by the statutory provision which creates and

permits the recovery of punitive damages in product liability cases by both plaintiffs *and* the state.

In *Gordon v. State*, 608 So.2d 800 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1647, 123 L.Ed.2d 268 (1993), the Supreme Court of Florida upheld a statute which required 60 percent of punitive damage awards to be paid either to the state's public medical assistance trust fund, or the state's general revenue fund. Quoting from the intermediate appellate court, the Florida court noted:

> [Gordon] has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether.

Id. at 801, *quoting* 585 So.2d at 1035-36. The intermediate appellate court in *Gordon*, also stated:

> Of course, since the legislature could have abolished the punitive damage claim altogether, or under this rationale, required that all of the award be payable to the state, the plaintiff can hardly complain of the determination that 60% (as opposed to 30% or 90%) was appropriate.

Gordon, 585 So.2d 1033, 1037 n.5 (1991), *aff'd* 608 So.2d 800 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1647, 123 L.Ed.2d 268 (1993) (Emph. in Orig.). This is exactly what

the Georgia Supreme Court already recognized in *Bagley v. Shortt*, 261 Ga. 762, 410 S.E.2d 738 (1991), and again in its decision in this case below.

The Supreme Court of Iowa also upheld apportionment of a punitive damage award to that state in *Shepherd Components v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612 (1991). Like the challenge here, the plaintiff in *Shepherd Components* raised due process and equal protection arguments under the federal and state constitutions. *Id.* at 619. The Iowa statute was actually more stringent than Georgia's statute in that it allowed a plaintiff to recover no more than 25 percent of a punitive damages award, making no provision for costs of the action borne by the plaintiff at all. I.S.A. § 668A.1(2)(b) (1987). According to the Iowa court:

> We have stated that punitive damages are not allowed as a matter of right and are discretionary. [Cit.Om.] We have also indicated that punitive damages are not intended to be compensatory and that a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it. [Cit.Om.] . . . Consequently, we hold that the trial court's distribution of punitive damages does not violate plaintiff's constitutional rights.

Id. at 619.

Thus, the Supreme Court of Iowa, the Supreme Court of Florida, and the Supreme Court of Georgia have all properly determined that the creation, definition, circumscription, and apportionment of punitive damage awards properly rests with the legislature as a matter of public

policy, and has been constitutionally exercised in these cases.

B. The Decision Of The Georgia Supreme Court Does Not Conflict With Decisions Of This Court Concerning The Takings Clause Of The Fifth Amendment.

The decision of the Georgia Supreme Court upholding the constitutionality of O.C.G.A. § 51-12-5.1(e)(2) does not contravene holdings of this Court as asserted by the Petitioners. As set forth in division II., A., *supra*, the case of *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), does not demand a different result since under the Georgia statute there is no compensatory amount belonging to plaintiffs which is apportioned. The State merely asserts its right to that portion of the punitive damages award allocated to it by statute. The State is not imposing a "user fee" upon Petitioners as was held impermissible in *Webb's Fabulous Pharmacies;* it is relying upon its independent claim to 75 percent of the punitive damages award, less a proportionate share of litigation costs.

Nor does the Court's decision in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), support a reversal of the lower court. There the government successfully used a *quid pro quo* theory to argue that it was not improper to require litigants with claims against Iran to compensate the United States for its efforts to establish a tribunal to hear such claims. The clear distinction between *Sperry* and this case is that *Sperry* dealt with the assessment or "taking" of property, i.e. the user fee, which did at one

time belong to the claimant, whereas the Petitioners here never owned or had any interest in the state's share of the punitive damages award.

Moreover, no organic law, either federal or state *requires* that legislation contain "give and take" principles. Cf. *Teasley, supra* at 564; *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 88 (1978). But even assuming *arguendo* that such a requirement existed in this case, there is a *quid pro quo* built into Georgia's statute. An element of "just and adequate compensation" is provided by virtue of the fact that plaintiffs in products liability cases *are not* subject to the $250,000.00 cap applicable to other plaintiffs. This trade-off appears to bestow a rather considerable benefit to Petitioners in this case. They stand to recover at a minimum $25,000,000.00 as their portion of the award, one hundred times the amount available to plaintiffs not relying upon a product liability theory in Georgia.

In addition, there is a demonstrable societal benefit associated with the statute in that it both punishes wrongdoers and reduces the inequalities inherent in the old law, *i.e.*, victims of manufacturer's malfeasance receiving large punitive awards, where victims of individual malfeasance receive either small or no awards.

Furthermore, product liability plaintiffs receive a proportionate share of their attorney's fees from the state's share of the award. Unless a statute of Georgia authorizes an award of attorney's fees, each party must ordinarily bear that expense. *Bowers v. Fulton County*, 227 Ga. 814, 815-16, 183 S.E.2d 347, 348 (1971); *Money v. Thompson & Green Machinery Co.*, 155 Ga. App. 566, 567,

271 S.E.2d 699, 700 (1980). Thus, consonant with the goals of tort reform, a plaintiff in a product liability action can generate a fund from which to obtain payment of his attorney's fees, and at the same time assist the public in eliminating defective products from the marketplace.

In summary, both *Sperry* and *Webb's Fabulous Pharmacies* dealt with situations where the government was taking funds from private parties which lawfully belonged to them. That is not the situation here. In this case, the State has not asserted a right to Petitioners' compensatory relief, any sums derived therefrom, or the 25 percent of the punitive damages recovery which is provided to them by statute. The State will receive that portion of the award which by statute belongs to it.

III. OTHER STATE COURT DECISIONS ARE NOT IN CONFLICT WITH THE CASE *SUB JUDICE* WHEN CONSIDERED IN CONJUNCTION WITH THE ACCOMPANYING STATUTORY SCHEMES.

Contrary to the assertion of Petitioners in seeking certiorari, the decisions of the state courts uniformly resolve the constitutional questions. Petitioners approach these decisions as if each state court decision was a referendum upon the relative merits of apportionment statutes, not a legal inquiry into individual statutory schemes. In each case, including the one *sub judice*, the appellate courts examined the statutory scheme to see if some right to all of the punitive damages award vested in the plaintiff prior to the time of the apportionment to the state. This is the key inquiry for purposes of Takings Clause analysis, for there must be property in order for it

to be taken. All of the state courts used appropriate constitutional principles in reaching their decisions. However, Colorado's statute failed to pass muster due to its unique provisions, a failing not shared by the other statutory schemes.

As indicated above, several states in addition to Georgia, have adopted similar statutes apportioning punitive damages: Florida, F.S.A. § 768.73(2)(b) (1992); Illinois, Ill. Rev. Stat. Ch. 735 § 5/2-1207 (1992); Iowa, I.C.A. § 668A.1(2)(b) (1987); Missouri, M.S.A. § 537.675(2); New York, N.Y. C.P.L.R. § 8701; Oregon, Or. Rev. Stat. § 18.540; and Utah, Utah Code Ann. § 78-18-1. Only three of these statutes have been constitutionally challenged and in only one instance did the statute fail to withstand constitutional scrutiny. In *Kirk v. Denver Publishing Co.*, 818 P.2d 264 (1991), a case heavily touted by Petitioners, the Colorado statute did not vest a right in the state to a portion of punitive damages until *after* judgment in favor of the Plaintiff had issued. *See* 6A Colo. Rev. Stat. Ann. § 13-21-102(4) (1987). The Colorado statute provided in part that: "Nothing . . . shall be construed to give the [state] any interest in the claim for exemplary damages or the litigation itself **at any time prior to payment becoming due**." 6A Colo. Rev. Stat. Ann. § 13-21-102(4) (1987) (Emph. Supp.). Thus, under the Colorado statute, "it is only after the injured party has invested the time, effort and expense of obtaining *and actually collecting the judgment* that the statutory grant of one-third interest to the state comes into play." *Kirk, supra,* at pp. 266-67. (Emph. Supp.).

Petitioners attempt to place themselves within the ambit of *Kirk* by pointing out that Georgia does not

obtain its recovery until after the compensatory portion of an award is paid. O.C.G.A. § 51-12-5.1(e)(2). *Compare United States v. Sperry*, 493 U.S. 52, 62 n.9 (1989) (money is fungible and whether deducted or received by separate payment is immaterial for Takings Clause analysis).

However, there is a fundamental difference between a right which vests *after* judgment, and a right which vests *prior* to entry of judgment but whose enforcement is postponed until after a compensatory award is paid. Georgia's statute falls into the latter category. Both the state and the plaintiff obtain their respective claim to punitive damages, inchoate though it might be, at the time the cause of action accrues. They stand on equal footing at the time judgment is entered. In fairness to the plaintiff, the General Assembly has simply postponed collection of the State's share until the compensatory payment has been made. Significantly, the accrual of the State's right to receive the proceeds is not delayed, payment is just temporarily postponed.

The Iowa and Florida apportionment statutes, like their Georgia counterpart, require apportionment *upon* entry of final judgment when a cause of action is converted into a recoverable property interest. Thus, the Florida statute provides "In the final judgment, the court shall order the percentages of the award, payable as provided in subsection (2)." Fla. Stat. Ann. § 768.73(3). (*See* Petition, A35). Similarly, the Iowa statute provides:

> . . . after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered

> paid into a civil reparations trust fund administered by the state court administrator.

Iowa Code Ann. § 668A.1(2)(b), (*See* Petition, A37). Georgia's interest in punitive damages vests at the same time as a plaintiff's interest, so there is a sharing or apportionment of punitive damages, but no taking. O.C.G.A. § 51-12-5.1(e)(2).

The Georgia, Florida and Iowa statutes on the one hand, and the Colorado statute on the other, are easily distinguished using Takings Clause analysis. Each of the courts interpreting the statutes inquired into the time that the state's interest vests. They each ruled based on the statute which was presented to them. In three cases, there was no taking. In one case, there was. The finding of a taking by the Colorado court does not conflict with the other courts' constitutional analysis which might be worthy of this Court's attention, but simply amounts to the examination of a single statute which was found not to comply with the uniform principles applied in all the cases. Accordingly, there is no conflict in the law to be resolved as Petitioners claim.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied, or alternatively the decision of the Supreme Court of Georgia should be summarily affirmed.

Respectfully submitted,

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